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10 Attorneys for WELLS FARGO BANK, NATIONAL ASSOCIATION AS TRUSTEE FOR  
11 THE CERTIFICATE HOLDERS OF STRUCTURED ASSET MORTGAGE  
12 INVESTMENTS II INC., BEAR STEARNS MORTGAGE FUNDING TRUST  
13 2006-AR5, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-  
14 AR5

15 UNITED STATES BANKRUPTCY COURT  
16 NORTHERN DISTRICT OF CALIFORNIA - OAKLAND DIVISION

17 In re

18 LANCE THOMAS LIBATIQUE AND  
19 RODITHA AGUIRRE LIBATIQUE,

20 Debtor(s).

Case No. 09-41624-EDJ

Chapter 13

R.S. No. AMB-354

MOTION FOR RELIEF FROM  
AUTOMATIC STAY  
(11 U.S.C. § 362 and Bankruptcy Rule 4001)

DATE: March 11, 2011  
TIME: 10:00am  
CTRM: 215

1300 Clay Street,  
Oakland, CA 94604-1426

21 TO THE RESPONDENTS NAMED ABOVE:

22 WELLS FARGO BANK, NATIONAL ASSOCIATION AS TRUSTEE FOR THE  
23 CERTIFICATE HOLDERS OF STRUCTURED ASSET MORTGAGE INVESTMENTS II  
24 INC., BEAR STEARNS MORTGAGE FUNDING TRUST 2006-AR5, MORTGAGE PASS-  
25 THROUGH CERTIFICATES, SERIES 2006-AR5<sup>1</sup> ("Movant"), respectfully represents as  
26 follows:

27 \_\_\_\_\_  
28 <sup>1</sup> This Motion for Relief from Automatic Stay shall not constitute a waiver of the within party's right to receive service pursuant to Fed. R. Civ. P. 4, made applicable to this proceeding by Fed. R. Bankr. P. 7004, notwithstanding Pite Duncan, LLP's participation in this proceeding. Moreover, the within party does not authorize Pite Duncan, LLP, either expressly or impliedly through Pite Duncan, LLP's participation in this proceeding, to act as its agent for purposes of service under Fed. R. Bankr. P. 7004.

**RELIEF FROM STAY - CAUSE**

**FAILURE TO MAKE POST-PETITION PAYMENTS**

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2  
3 1. This court has jurisdiction over the subject matter of this Motion pursuant to the  
4 provisions of 28 United States Code §§ 157, 1334, and 11 United States Code § 362.

5 2. On or about March 3, 2009, Roditha Aguirre Libatique ("Borrower") and Lance  
6 Thomas Libatique (collectively, the "Debtors") filed a voluntary petition under Chapter 13 of the  
7 Bankruptcy Code. Martha G. Bronitsky is the appointed Chapter 13 Trustee.

8 3. On or about September 18, 2006, Borrower, for valuable consideration, made,  
9 executed and delivered to Kay-Co Investments, Inc. ("Lender") a Note in the principal sum of  
10 \$488,000.00 (the "Note"). Pursuant to the Note, Borrower is obligated to make monthly principal  
11 and interest payments commencing November 1, 2006, and continuing until December 1, 2036,  
12 when all outstanding amounts are due and payable. A copy of the Note is attached to the  
13 Declaration in Support of Motion for Relief From Automatic Stay as exhibit A and incorporated  
14 herein by reference.

15 4. On or about September 18, 2006, Debtors made, executed and delivered to Lender  
16 a Deed of Trust (the "Deed of Trust") granting Lender a security interest in the certain real  
17 property located at 37050 Reynolds Common, Fremont, California 94536 (hereinafter "Real  
18 Property"), which is more fully described in the Deed of Trust. The Deed of Trust provides that  
19 attorneys' fees and costs incurred as a result of the Debtors' bankruptcy case may be included in  
20 the outstanding balance under the Note. The Deed of Trust was recorded on October 2, 2006, in  
21 the Official Records of Alameda County, State of California. A copy of the Deed of Trust is  
22 attached to the Declaration in Support of Motion for Relief From Automatic Stay as exhibit B  
23 and incorporated herein by reference.

24 5. Subsequently, Lender's beneficial interest in the Deed of Trust was assigned and  
25 transferred to Movant. A copy of the Corporation Assignment of Deed of Trust evidencing the  
26 Assignment of the Deed of Trust to Movant is attached to the Declaration in Support of Motion  
27 for Relief From Automatic Stay as exhibit C and incorporated herein by reference.

28 /././

1           6.       The obligations under the Note are in default for failure to make payments as of  
2 April 1, 2010. As of January 13, 2011, the total obligation due and owing under the Note is in the  
3 approximate amount of \$609,665.91, representing the principal balance of \$545,417.93, interest  
4 in the sum of \$39,567.37, late charges in the amount of \$765.03, escrow advances in the amount  
5 of \$23,608.71, and recoverable balance of \$306.87. Moreover, the total arrears under the Note  
6 are in the approximate sum of \$53,197.51, excluding the post-petition attorneys' fees and costs  
7 incurred in filing the instant Motion. This is an approximate amount for purposes of this Motion  
8 only, and should not be relied upon as such to pay off the subject loan as interest and additional  
9 advances may come due subsequent to the filing of the Motion. An exact payoff amount can be  
10 obtained by contacting Movant's counsel.

11           7.       Pursuant to 11 United States Code § 1322, and the Debtors' Chapter 13 Plan, the  
12 Debtors are obligated to make all post-petition payments owing on the Note directly to Movant.  
13 However, Movant has not received the post-petition payments owing for October 1, 2010  
14 through January 1, 2011. Accordingly, the post-petition arrears owing under the Note are in the  
15 approximate sum of \$12,122.87, consisting of three (3) payments of \$2,780.15, one (1) payment  
16 of \$4,505.57, and less a suspense balance of \$723.15, excluding the post-petition attorneys' fees  
17 and costs incurred in filing the instant Motion. A copy of the post-petition payment accounting  
18 pursuant to Local Rule 4001-1(g)(1) is attached to the Declaration in Support of Motion for  
19 Relief From Automatic Stay as exhibit D and incorporated herein by reference.

20           8.       A debtor's failure to make post-petition mortgage payments as they become due in  
21 a Chapter 13 case constitutes "cause" for relief from the automatic stay pursuant to 11 United  
22 States Code § 362(d)(1). In re Ellis, 60 B.R. 432, 435 (B.A.P. 9th Cir. 1985). Accordingly, as the  
23 Debtors have failed to make post-petition payments under the Note, Movant is entitled to relief  
24 from the automatic stay pursuant to 11 United States Code § 362(d)(1).

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1 **RELIEF FROM STAY**

2 **LACK OF EQUITY**

3 9. Movant is informed and believes that, based on the Debtors' bankruptcy  
4 Schedules, the fair market value of the Real Property is no more than \$464,500.00. True and  
5 correct copies of Debtors' bankruptcy Schedules A and D are collectively attached to the  
6 Declaration in Support of Motion for Relief From Automatic Stay as exhibit E and incorporated  
7 herein by reference.

8 10. Based on the above, under the best case scenario, Movant is informed and  
9 believes that the equity in the Real Property is as follows:

10 Fair Market Value:	\$464,500.00
11 Less:	
12 Movant's Trust Deed	\$609,665.91
13 EMC Mortgage's Second Mortgage	\$120,000.00
Costs of Sale (8%)	<u>\$37,160.00</u>
Equity in the Property:	\$<302,325.91>

14 As a result, there is no equity in the Real Property to be realized by the Debtors or the  
15 bankruptcy estate. Further, as the Debtors are unable to service the debt on the Real Property,  
16 Movant contends that the Real Property is not necessary for an effective reorganization.  
17 Therefore, Movant is entitled to relief from stay under 11 United States Code § 362(d)(2).

18 11. If Movant is not allowed to regain possession of and to foreclose on the Real  
19 Property it will suffer irreparable injury, loss and damage.

20 **RELIEF FROM STAY - CAUSE**

21 **ADEQUATE PROTECTION**

22 12. Pursuant to the provisions of 11 United States Code §§ 361 and 362(d), Movant is  
23 entitled to adequate protection of its interest in the Real Property.

24 13. Movant submits the adequate protection in this case requires normal and periodic  
25 cash payments, as called for by the Note, plus the repayment of any and all delinquent amounts  
26 owed to Movant, including all attorneys' fees and costs incurred in the filing of this motion.

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1           14.     Movant is informed and believes that Debtors are presently unwilling or unable to  
2 provide adequate protection to the Movant and there is no probability that adequate protection  
3 can be afforded to Movant within a reasonable time.

4           15.     By reason of the foregoing, Movant is entitled to relief from stay under 11 United  
5 States Code § 362(d)(1), based upon the failure of Debtors to provide adequate protection to  
6 Movant and to make payments as required by 11 United States Code § 1322.

7           WHEREFORE, Movant respectfully prays for an Order of this court as follows:

8           1)     Terminating the automatic stay of 11 United States Code § 362, as it applies to the  
9 enforcement by Movant of all of its rights in the Real Property under the Note and the Deed of  
10 Trust;

11          2)     That the 14-day stay described by Bankruptcy Rule 4001(a)(3) be waived;

12          3)     Granting Movant leave to foreclose on the Real Property and to enforce the  
13 security interest under the Note and the Deed of Trust, including any action necessary to obtain  
14 possession of the Property;

15          4)     The Order Terminating Stay of 11 U.S.C. § 362 shall be binding and effective and  
16 supersede any subsequently entered confirmation order that confirms a Chapter 13 Plan of  
17 Reorganization providing for the treatment of Movant's claim.

18          5)     Permitting Movant to offer and provide Debtors with information re: a potential  
19 Forbearance Agreement, Loan Modification, Refinance Agreement, or other Loan Workout/Loss  
20 Mitigation Agreement, and to enter into such agreement with Debtors;

21          6)     Alternatively, in the event this court declines to grant Movant the relief requested  
22 above, Movant requests that an Order for adequate protection be issued, requiring the Debtors to  
23 reinstate and maintain in a current condition all obligations due under the Note and Deed of Trust  
24 and all other deeds of trust encumbering the Real Property, including Debtors' obligations to pay  
25 when due (a) the monthly installments of principal and interest, as required under the Note;  
26 (b) tax/insurance obligations; and (c) any sums advanced by Movant on behalf of Debtors in  
27 order to protect Movant's interest in the Real Property, including all attorneys' fees and costs  
28 incurred in the filing of this motion;

1           7)       That the attorneys' fees and costs incurred by Movant for filing the instant Motion  
2 be included in the outstanding balance of the Note as allowed under applicable non-bankruptcy  
3 law; and

4           8)       For such other and further relief as the court deems just and proper.

5 Dated: February 15, 2011

PITE DUNCAN LLP

6  
7                               /s/ ALEXIS M. BORNHOFT (CA SBN 270200)  
8 Attorneys for WELLS FARGO BANK,  
9 NATIONAL ASSOCIATION AS TRUSTEE FOR  
10 THE CERTIFICATE HOLDERS OF  
11 STRUCTURED ASSET MORTGAGE  
12 INVESTMENTS II INC., BEAR STEARNS  
13 MORTGAGE FUNDING TRUST 2006-AR5,  
14 MORTGAGE PASS-THROUGH CERTIFICATES,  
15 SERIES 2006-AR5  
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